

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7453

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-7453

KAHLMAN LINKER and DYNAMISM,.

Plaintiffs-Appellants,

-against-

MERRILL LYNCH, PIERCE, FENNER & SMITH,
INC., DEAN WITTER & CO., INC., GOLDMAN,
SACHS & CO., WALTER F. BAUER, WERNER
L. FRANK, FRANCIS V. WALKER, and all
other executive officers and directors
of INFORMATICS, INC., as of February
27, 1974, HENRY J. SMITH, former Chair-
man and Director, and all other
directors of the EQUITABLE LIFE
ASSURANCE SOCIETY OF THE UNITED STATES,
as of February 27, 1974, THE EQUITABLE
LIFE HOLDING CORP., and all others
whom discovery may show should be named,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE
GOLDMAN, SACHS & CO.

SULLIVAN & CROMWELL
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SMITH, INC., et al.,

Defendants-Appellees.

BRIEF FOR DEFENDANT-APPELLEE
GOLDMAN, SACHS & CO.

This is an appeal from the dismissal of the complaint on the District Court's own motion (Honorable Henry F. Werker) on the ground that the plaintiff is not the real party in interest and lacks standing to sue.

QUESTIONS PRESENTED

Appellant Linker asserted individual and derivative claims in connection with the merger of two companies. He has never been a shareholder of either company, but purports to sue claiming that adult relatives of his, including his wife, were shareholders and that he is presently the beneficiary in his wife's will.

1. On the above facts, does appellant Linker have standing to sue as the real party in interest?
2. Does appellant Linker have capacity to represent others in the federal courts when he is not admitted to practice law?

STATEMENT OF FACTS

This action was commenced on August 10, 1976 in the names of Kahlman Linker and Dynamismmm for alleged violations of various provisions of the Securities Exchange Act of 1934 in connection with a merger of Informatics, Inc. ("Informatics") into the Equitable Computer Corporation on February 27, 1974. The terms of the merger were approved by a majority of the shareholders of Informatics as required by Delaware law.

Kahlman Linker was not a shareholder of Informatics at the time of the events complained of in his complaint. (44a, 52a) At the time of the merger his wife, Ruth T. Linker, owned 1,000 shares of Informatics and his son, Jon S. Linker, and his daughter, Kate Linker, each owned 600 shares. These shareholders were all of age. (45a) Kahlman Linker is a named beneficiary in his wife's will which was executed on October 27, 1972. The will of Ruth T. Linker (not yet deceased) provides that he is to share in her residuary estate.

Dynamismmm has made application to become a not-

for-profit corporation and was described as an "informally organized association of 177 participants." (45a) The following discussion on Dynamismmm's status occurred in the Court below:

"THE COURT: And who is the unincorporated association constituting Dynamismmm?

MR. LINKER: That is Kahlman Linker.

"THE COURT: That is yourself.

MR. LINKER: That is myself.

"THE COURT: You were not a stockholder at the time.

MR. LINKER: I was not a stockholder at the time." (52a)

Dynamismmm, although not in existence, purports to hold a power of attorney to represent in this proceeding the interests of Irving P. Grace, of Lambertville, New Jersey, who owned 6,000 shares at the time of the merger.

The purpose of Dynamismmm was explained by Kahlman Linker as follows:

"Dynamismmm was formed with the hope and expectation that some vehicle would be set up which would aid these individuals in getting good counsel and money to finance their causes where there is merit involved." (58a-59a)

Kahlman Linker is not an attorney at law and is appearing pro se in this action for himself and for Dynamismmm.

Judge Werker dismissed the complaint sua sponte on September 8, 1976.

ARGUMENT

1

Plaintiff Is Not A Real Party In Interest

Rule 17(a) of the Federal Rules of Civil Procedure provides that "[e]very action shall be prosecuted in the name of the real party in interest." The purpose of this Rule is "to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Advisory Committee's Notes to the 1966 Amendment to Rule 17(a), 39 F.R.D. 69, 85 (1966). This Rule also has the desired effect of limiting vexatious lawsuits by litigious individuals.

Professor Moore in his treatise summarizes the true meaning of real party in interest as follows: "An action shall be prosecuted in the name of the party who, by the substantive law, has the right sought to be enforced." 3A Moore's Federal Practice ¶ 17.07 at 17-221 (2d ed. 1974) (emphasis in original).

Although the Federal courts permit beneficial owners, and not only registered owners, of securities to sue,* no court to our knowledge has treated family relation-

* Drachman v. Harvey, 453 F.2d 722 (2d Cir. 1971). See Heyman v. Heyman, 356 F. Supp. 958 (S.D.N.Y. 1973); Ornstein v. Compusamp, Inc., 19 F.R. Serv. 2d 466 (S.D.N.Y. 1974).

ships as sufficient beneficial interest to create standing under Rule 17(a).

Linker fares no better in his contention that the will of his still-living wife confers upon him some beneficial interest, even indirect. See Pinckney v. City Bank Farmers Trust Co., 249 App. Div. 375, 377, 292 N.Y.S. 835, 838 (1937).

Linker's reliance on the provisions of Section 16(a) of the Securities Exchange Act, 15 U.S.C. § 78p(a), is equally misplaced. However the SEC regulations may treat "affiliates" for purposes of identifying possible "control", those provisions have no applicability whatsoever with respect to standing before the courts.

Whether the test is made under the substantive provisions of law which require the plaintiff to be a purchaser or seller of securities, see Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975), or treated under the derivative count as failing to satisfy the contemporaneous ownership requirement of Federal (Fed. R. Civ. P. 23.1), Delaware (8 Del. C. 1953, § 327) or New York law (N.Y.E.C.L. § 626), the result is the same. Linker was not the holder or owner of securities at the time, and therefore lacks standing to sue.

II

Plaintiff Cannot Represent The Interest of Others

Title 28 of the Judicial Code, Section 1654

provides that:

"In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

Rule 3(c) of the General Rules for the Southern District of New York states that "only an attorney or proctor of this court may enter appearances for parties, sign stipulations or receive payments upon judgments, decrees or orders."

These provisions arise out of the necessity, in the proper administration of justice, of having legal proceedings carried on according to the rules of law and the practice of courts and by those charged with the responsibility of legal knowledge and professional responsibility. Mercu-Ray Industries, Inc. v. Bristol-Meyers Co., 392 F. Supp. 16 (S.D.N.Y. 1974).

The District Court here faced with numerous motions, appropriately dismissed the complaint sua sponte. Such action was certainly justified in law and well within the Court's discretion. On appeal, appellees limit their

argument to ad hominem attacks on Judge Werker and his law clerk.

CONCLUSION

The judgment of the District Court should be affirmed in all respects.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
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KAHLMAN LINKER & DYNAMISM, :

Plaintiff-Appellant, :

-against- :

Docket No.
76-7453

MERRILL LYNCH, PIERCE, FENNER & SMITH, :
INC., et al.,

Defendants-Appellees. :

- - - - - x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GEORGE A. SCHOLZE, being duly sworn, deposes and says that he is an attorney associated with the firm of Sullivan & Cromwell, attorneys for Goldman Sachs & Co.; that on the 15th day of November, 1976 he served the within brief upon the following attorneys at the following addresses by depositing two true copies of the same to each, securely enclosed in a postpaid wrapper in the Post Office Box regularly maintained by the United States Government at 48 Wall Street, Borough of Manhattan, City and State of New York, directed to said attorneys at said addresses as follows:

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George A. Scholze

Sworn to before me this
15th day of November, 1976

Eileen L. Franklyn
Notary Public

EILEEN L. FRANKLYN
NOTARY PUBLIC, State of New York
No. 31-1303130
Qualified in New York County
Commission Expires March 30, 1977